

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

**STATE OF OKLAHOMA, et al.**

**PLAINTIFFS**

**v.**

**CASE NO.: 05-CV-00329-TCK-SAJ**

**TYSON FOODS, INC., et al.**

**DEFENDANTS**

**RESPONSE TO STATE OF OKLAHOMA'S MOTION TO  
SETTLE THE TERMS OF THE CONFIDENTIALITY ORDER**

Defendants, Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., Cobb-Vantress, Inc., Cal-Maine Foods, Inc., Cal-Maine Farms, Inc., Cargill, Inc., Cargill Turkey Production, LLC, George's, Inc., Georges's Farms, Inc., Peterson Farms, Inc., Simmons Foods, Inc., and Willow Brook Foods, Inc. (collectively "Defendants") submit the following as their Response to the State of Oklahoma's Motion to Settle the Terms of the Confidentiality Order.

**I. INTRODUCTION**

In its August 15, 2006, Order (Dkt. No. 888) this Court resolved the parties' dispute over the nature and scope of the Confidentiality Order for this case. In particular, Plaintiffs objected to a two-tiered confidentiality provision under which all parties would have the right in very narrow circumstances to designate documents as "Confidential – Attorneys Eyes Only." The Court overruled Plaintiffs' objection and expressly found "that the two-tiered confidentiality protection requested by Defendants is appropriate." 8/15/06 Order, p. 2 (Dkt. No. 888). The Court concluded that "[g]iven the rulings of the Court, the parties should work together to reach an agreed confidentiality order, and submit that agreed order to the Court for signature." 8/15/06 Order, p. 2 (Dkt. No. 888).

On August 22, 2006, Plaintiffs submitted a draft of a proposed confidentiality order to the Defendants for their consideration. Amazingly, in § 5(c)(2) of their proposed order, Plaintiffs

tried to exempt themselves entirely from the Court's "Attorneys' Eyes Only" ruling. Plaintiffs arrogantly insist that they (unlike the other parties subject to the Court's order) should be granted the discretion to share "Attorneys' Eyes Only" documents and information with a potentially unlimited number of "State employees." Pls. Mot. to Settle Terms of Conf. Order, pp. 2-4 (Dkt. No. 917). In accordance with this Court's instruction, Defendants attempted to resolve this issue with Plaintiffs. Specifically, Defendants suggested revisions to § 5(c)(2) to delete Plaintiffs' claimed exemption from the Attorneys Eyes Only ruling of this Court. Defendants submit, as Exhibit A hereto, their proposed confidentiality order which is materially identical to that proposed by Plaintiffs except for the deletion of § 5(c)(2).<sup>1</sup>

## II. ARGUMENT

Defendants object to the inclusion of Plaintiffs' section 5(c)(2) in the confidentiality order. This Court simply did not exempt the State and its employees from the heightened Attorneys' Eyes Only protections of the Confidentiality Order. These protections are essential to maintain the competitive information of Defendants. The mere fact that the State is not a "competitor" of Defendants does not obviate the very real and substantial risks posed to Defendants by a wide-ranging dissemination of valuable and closely guarded trade secrets. Removal of section 5(c)(2) will not hamper the Plaintiffs' case preparation, because section 5(c)(4) of Defendants' proposed confidentiality order affords the Plaintiffs with an appropriate and reasonable alternative to section 5(c)(2), while still providing Defendants will the protection this Court has already determined to be appropriate with regard to highly sensitive and proprietary information.

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<sup>1</sup> Pursuant to this Court's Order entered August 15, 2006 (Dkt. No. 888), Defendants' proposed confidentiality order (Exhibit A) is being submitted to this Court in Word format.

**A. Disclosure of Highly Sensitive Information to State Employees is Potentially Harmful to Defendants**

The obvious purpose of permitting “Attorneys’ Eyes Only” designations of highly sensitive and proprietary information and documents is to reduce the likelihood that a disclosing party will be injured or disadvantaged by such information becoming known to others through whatever means. Plaintiffs’ proposed section 5(c)(2) permits disclosure of confidential and proprietary information to countless people solely at Plaintiffs’ discretion. Plaintiffs’ suggestion that such wide-spread and indiscriminate dissemination of competitive information should be of no concern to Defendants is simply absurd.

Plaintiffs argue that “disclosures to State employees would in no way implicate the trade secret concerns advanced by the Poultry Integrator Defendants” because the State is not in competition with the Defendants. Pls. Mot. to Settle the Terms of the Conf. Order, p. 2 (Dkt. No. 917). The competitive world in which these Defendants operate is not as simplistic as Plaintiffs’ suggest. While State employees are not currently competitors of Defendants, they could be in the future. In today’s marketplace, employees frequently move back and forth from public to private employment. Further, State employees, particularly those at the Oklahoma Department of Agriculture, Food and Forestry (“ODAFF”), are in regular contact with representatives of each of the poultry companies joined as Defendants in this action. The possibility of an inadvertent disclosure by a State employee of one defendants’ highly sensitive information to present or future competitors is more than theoretical.

**B. Plaintiffs Have Not Demonstrated a Need to Disseminate Attorney’s Eyes Only Materials to State Employees**

Before this Court grants Plaintiffs an unfettered license to distribute highly sensitive documents and information to an unlimited number of unidentified “State employees,” a

showing of substantial need should be required. Plaintiffs make no such showing in their Motion. Plaintiffs have not identified a single document or category of “Attorneys’ Eyes Only” information which needs to be reviewed for some legitimate purpose by State employees. In fact, no document has yet been produced by any Defendant bearing a designation of “Attorneys’ Eyes Only.” Plaintiffs simply make the *ipse dixit* claim that information to be designated in the future by Defendants as Attorneys’ Eyes Only materials will be the type of information for which the evaluation by State employees is needed. Likewise, Plaintiffs have not identified any of the State employees which supposedly constitute the “tremendous repository of knowledge and experience on many of the issues raised in this litigation.” Pls. Mot. to Settle the Terms of the Conf. Order, p. 3 (Dkt. No. 917). Here again, Plaintiffs merely ask this Court to accept their vague and unsubstantiated generalizations as proof. This Court should not grant an open-ended exemption to Plaintiffs based upon sheer speculation and vague generalizations.

**C. Defendants’ Proposed Protective Order Adequately Balances the Parties’ Interests with Respect to Highly Sensitive Documents and Information**

Plaintiffs argue, again without proof or support, that the Confidentiality Order proposed by Defendants would “deprive the State’s Counsel of the ability to share and discuss [Attorneys’ Eyes Only] documents . . . with State employees” which in turn would “seriously, and needlessly, prejudice the State in its trial preparations.” Pls. Mot. to Settle the Terms of the Conf. Order, pp. 3-4 (Dkt. No. 917). Of course, Plaintiffs conveniently fail to advise the Court of section 5(c)(4) in Defendants’ proposed confidentiality order. *See* Ex. 1.<sup>2</sup> This provision preserves the State’s ability to share Attorneys’ Eyes Only documents with State employees in those instances where Plaintiffs have demonstrated to the Defendants’ or this Court’s satisfaction

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<sup>2</sup> Significantly, Section 5(c)(4) of Defendants’ proposed confidentiality order is identical to Section 5(c)(5) of Plaintiffs’ proposed confidentiality order.

a need for doing so and provides proper procedures to safeguard the Defendants' highly sensitive information.

Section 5(c)(4) of Defendants' proposed confidentiality order states:

**(c) Limited Third Party Disclosures of Documents Designated as CONFIDENTIAL ATTORNEYS' EYES ONLY.** The parties and counsel for the parties shall not disclose or permit the disclosure of any documents designated CONFIDENTIAL ATTORNEYS' EYES ONLY under the terms of this Order to any other person or entity except as set forth in subparagraphs (1)-(5) below, and then only after the person to whom disclosure is to be made has executed an acknowledgment (in the form set forth at Attachment A hereto), that he or she has read and understands the terms of this Order and is bound by it. Subject to these requirements, the following categories of persons may be allowed to review documents which have been designated CONFIDENTIAL ATTORNEYS' EYES ONLY pursuant to this Order:

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(4) other persons only upon consent of the producing party or upon order of the court and on such conditions as are agreed to or ordered.

*See Ex. A.* Thus, pursuant to section 5(c)(4) of Defendants' proposed confidentiality order, Plaintiffs may still share Attorneys' Eyes Only documents with State employees. Plaintiffs must simply obtain the permission of this Court or the producing party before doing so. This reasonable compromise which would allow the Plaintiffs, the Defendants and this Court to evaluate any future disputes over access to highly sensitive information in the proper context, taking into account the specific nature of the information at issue, the number and identity of State employees for which access is sought, and the safeguards proposed by Plaintiffs to prevent any potential leaking or dissemination of competitive information. Plaintiffs, urge a regime without accountability and ask the Defendants and this Court to just "trust them" judiciously to exercise some broad and undefined grant of discretion in these matters. However, when it comes to the sharing of highly sensitive information, it is protection and not trust that is required. Such

decisions cannot be made on a global basis and should not be entrusted to a disclosing party's adversary.

### III. CONCLUSION

For the foregoing reasons, Defendants object to the entry by this Court of Plaintiffs' proposed Confidentiality Order and respectfully request that this Court settle the terms of the confidentiality order in accordance with Exhibit A and enter such order.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that on the 6th day of October, 2006, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

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